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ABSTRACT

A 4-day simulation activity encourages high school students to confront issues of law and journalism through exploration of seven legal issues: prior restraint, access to courts, rights of reply, libel, privacy, confidential sources, and use of stolen documents. The kit contains all materials needed for the simulation, including a director's manual, student guide, legal code, player identification cards, and simulation instructions. The director's guide presents an overview of the game, preparation directions, instructions for play, post-game discussion questions, and additional readings. The student guide introduces players to the game and provides background readings on freedom of the press, First Amendment protection, the purpose of the First Amendment, modern problems of law and media, and sample dilemmas. The legal code contains cases and information about the seven legal issues stated above. The instruction set consists of one-page directions for each simulation player, including three reporters, an editor, a newspaper lawyer, a prosecutor, a secretary, a criminal defense lawyer, and a congressman. (LP)

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A Simulation of Legal Issues in Journalism

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Freedom of the Press

SO 015 986

by
Ethan Katsh

THIS KIT CONTAINS THE FOLLOWING MATERIALS:

I. Director's Manual

II. Student Guide to Freedom of the Press

III. Legal Code

IV. Identification Cards (for sources of information)

V. Instructions for:

A. Reporters:

1. Reporter Gray
2. Reporter Green
3. Reporter Brown

B. Editor's Instructions

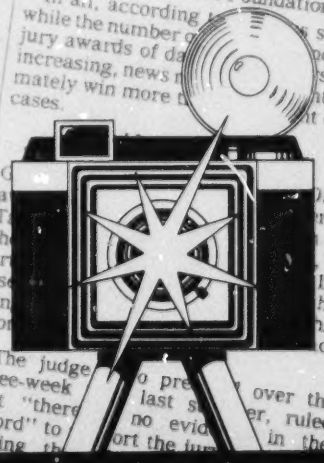
C. Newspaper Lawer's Instructions

D. Sources:

1. Prosecutor's Instructions
2. Secretary's Instructions
3. Criminal Defense Lawyer's Instructions
4. Congressman's Instructions

Director's Manual

FREEDOM OF THE PRESS



Freedom of the Press

A Simulation of Legal Issues in Journalism

by Ethan Katsh

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Graphic Design by Joan Linden

"Somebody—was it Burke?—called Journalism the fourth estate. That was true at the time, no doubt. But at the present moment it really is the only estate. It has eaten up the other three. The Lords Temporal say nothing, the Lords Spiritual have nothing to say, and the House of Commons has nothing to say and says it. We are dominated by Journalism. In America the President reigns for four years, and Journalism governs for ever and ever."

Oscar Wilde, *Soul of Man Under Socialism*, (1895)

Oscar Wilde's satircal statement about journalism provides a provocative starting point for thinking about the role of the news media in modern society. How powerful is the news media and when should it be regulated? What is the relationship between the government and the press? What protection can individuals receive from a zealous press?

This simulation is designed to enable your students to play the roles of reporters, editors, lawyers and citizens who have newsworthy information. The process of gathering news will raise both legal and ethical issues for the participants. They will be required to make decisions and to choose among different courses of action. It is hoped that this will lead to a stimulating discussion of the role and impact of the mass media and to a greater understanding of the powers and limitations of law.

The educational value of the game lies in its combining substantive information with the motivational rewards of simulations. In playing various roles, participants will also become aware of their own values and those of the other participants, and will gain insight into decision making, negotiation and compromise.

It is important to be clear about the purpose of this game—to provide an enjoyable experience for students which will stimulate their interest in the subject and provide some substantive information about an extremely important constitutional issue. The simulation may make your job more interesting, since we generally prefer to teach highly motivated students. But it will not necessarily make your task easier. The game is an introduction to the First Amendment and can be expected to raise questions about the history of freedom of the press, about the justification for it, and about the need for the First Amendment in an era of electronic media, in addition to heightening interest in the particular legal issues in the game. The game is meant to be a starting point for class inquiry in an area of legal and social significance. It is expected that discussion and further reading will follow the playing of the game.

This kit contains the following materials:

- DIRECTOR'S MANUAL — 1 copy
- STUDENT GUIDE TO FREEDOM OF THE PRESS — 35 copies
- LEGAL CODE — 6 copies
- IDENTIFICATION CARDS (for sources of information) — 2 copies
- INSTRUCTIONS FOR:
- REPORTERS:
  Reporter Gray — 2 copies
  Reporter Green — 2 copies
  Reporter Brown — 2 copies
- EDITORS — 15 copies
- NEWSPAPER LAWYERS — 6 copies
- SOURCES:
  Prosecutor — 2 copies
  Secretary — 2 copies
  Criminal Defense Lawyer — 2 copies
  Congressman — 2 copies

All materials, except the Student Guide, are printed in two colors. The two colors represent the two newspapers that are being simulated.

The director should read all the materials prior to playing the game. The *Director's Manual* explains how the simulation is organized and what preparation is needed in order to play it. The *Student Guide to Freedom of the Press* is for all students to read before the game is played. It explains the purpose of the game, the historical background of freedom of the press, and raises questions concerning a series of legal issues involving the press. The *Legal Code* will enable the students playing the lawyers' roles to answer questions that will be asked of them. The Instruction Sheets will inform the students what they must do for their particular roles.

I. *Overview of the Game and Responsibilities of the Game Director.*

1. The game forces students to confront issues of both law and journalism. First, there are a series of seven legal issues that players will encounter:

a. PRIOR RESTRAINT—When can a judge prohibit a newspaper from publishing a story?

b. ACCESS TO COURTS—When can the press and the public be barred from attending a court hearing?

c. RIGHT OF REPLY—Can a person who is attacked in a newspaper demand space for a reply?

d. LIBEL—When can a person sue for libel?

e. PRIVACY—When can a person sue for invasion of privacy?

f. CONFIDENTIAL SOURCES—Can a reporter be ordered to reveal the names of sources of information?

g. USE OF STOLEN DOCUMENTS—Can newspapers and reporters be punished for using stolen documents in their stories?

Second, there are issues of journalistic ethics and responsibility. When should a story be published? How much confidence in the truth of the story should be required? When is a story newsworthy?

2. You should familiarize yourself with the rules of the game by reading this manual and the Instruction Sheets for the various roles. The instruction sheets explain to the players their responsibilities and duties and contain most of the rules for the actual play of the game.

Your main task is to handle the logistics of playing the game and to conduct the discussion following the game. Organizing the class for the playing of the game is fairly complicated. Roles need to be distributed and everyone needs to be put into their assigned places in the classroom before play can begin. Once this is done and play begins, the game will generally run by itself. You may have to answer a question or two but you should have most of the time during play to simply observe what is happening and to make notes about what to discuss later.

3. Suggested time requirements: Roughly four hours.
Hour 1 — Preparation
Hour 2 — Play
Hours 3 and 4 — Debriefing and discussion.

4. Number of players: 11-35

Use the following table to determine how many editors and newspaper lawyers there will be. There are always three reporters (Gerald Gray, Susan Green and Robert Brown) and four sources of information (criminal defense lawyer, secretary, prosecutor and congressman). By adjusting the number of editors and newspaper lawyers, and by creating a second newspaper for classes of twenty or more students, the game can be played by 11-35 students (or even a few more if absolutely necessary).

DISTRIBUTION OF PLAYERS

No. of Students	Newspaper 1		
	Editors	Lawyers	Reporters
11	1	3	3
12	2	3	3
13	3	3	3
14	4	3	3
15	5	3	3
16	6	3	3
17	7	3	3
18	8	3	3
19	9	3	3
20	1	2	3
21	1	3	3
22	2	2	3
23	2	2	3
24	3	3	3
25	3	3	3
26	3	3	3
27	4	3	3
28	5	3	3
29	6	3	3
30	6	3	3
31	6	3	3
32	6	3	3
33	7	3	3
34	8	3	3
35	9	3	3

Newspaper 2				
Sources	Editors	Lawyers	Reporters	Sources
4				
4				
4				
4				
4				
4				
4				
4				
4				
4	1	2	3	4
4	1	2	3	4
4	2	2	3	4
4	2	3	3	4
4	2	2	3	4
4	2	3	3	4
4	3	3	3	4
4	3	3	3	4
4	3	3	3	4
4	3	3	3	4
4	4	3	3	4
4	5	3	3	4
4	6	3	3	4
4	6	3	3	4
4	6	3	3	4
4	6	3	3	4

When more than three editors are used, the extra editors should be divided fairly evenly among the groups. The editors should be instructed that they are to work together and come to a group decision about whether the story should be published.

When the game is played with 20-25 students, fewer than three editors or newspaper lawyers will be used for one or both papers. This makes the role of editor or newspaper lawyer slightly more demanding. In these circumstances, the responsibility of the editor and lawyer is as follows:

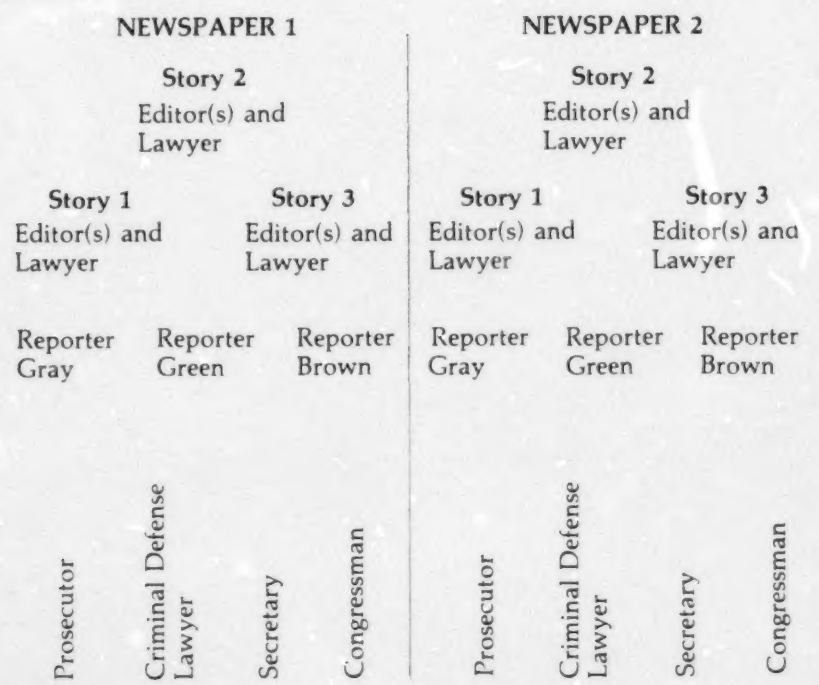
a. Where there is only one editor, that editor will oversee all three reporters and make a decision for each story as to whether it should be published. You should explain this to the editor since his instruction sheet tells him that he is only editing one story and supervising one reporter.

b. Where there are two editors, one editor will be responsible for supervising two reporters and the other editor for one reporter. You should choose which editor will have the extra responsibility.

c. Where there are only two newspaper lawyers, one of the lawyers should be assigned the legal issues for two of the stories.

5. Arrangement of room.

It is recommended that the following classroom arrangement be used for the simulation.



6. Goals and limitations of the simulation: This is a simulation of a complicated process. Its purpose is to cause students to think about a series of important questions related to freedom of the press. Nobody will become an expert in First Amendment law by playing this game but participants should become knowledgeable citizens. The interest and enthusiasm which will be generated by playing the game should be built upon by the teacher in subsequent class discussions and in developing research projects related to the simulation.

II. *Preparation*

Explain to the class that during the next class session they will be playing a simulation game involving freedom of the press. The main roles are the following:

1. Reporters—There are three reporters (six if two newspapers are being simulated). The job of these people, Gerald Gray, Susan Green and Richard Brown, will be to interview one or more of the other players and prepare a story.

2. Editors—The persons playing this role will be faced with the decision of whether or not to publish a particular story.

3. Newspaper Lawyers—The persons playing this role will provide advice about legal questions that will arise.

4. Remaining students will portray persons possessing newsworthy information. There are four news sources in the game: **prosecutor, secretary, congressman and criminal defense lawyer.**

The game focusses on three news stories. One reporter, one or more editors, and one lawyer, is assigned to each of the stories. Reporter Gray is involved in Story 1, Reporter Green in Story 2, and Reporter Brown in Story 3. The three stories are related and may overlap. They are all part of a series of articles being prepared about ex-C.I.A. agents. The following table summarizes how to distribute the instructions:

Story 1

Reporter: Reporter Gray's Instructions
Editor: Editor's Instructions
Lawyer: Lawyer's Instructions and Legal Code

Story 2

Reporter Green's Instruction
Editor's Instructions
Lawyer's Instructions and Legal Code

Story 3

Reporter: Reporter Brown's Instructions
Editor: Editor's Instructions
Lawyer: Lawyer's Instructions and Legal Code

All editors receive the same instructions and all the lawyers receive the same materials. YOU MUST REMEMBER, THEREFORE, TO TELL EACH EDITOR AND LAWYER WHICH STORY THEY ARE WORKING ON.

After these roles have been filled, persons should be selected to be Prosecutor, Congressman, Secretary and Criminal Defense Lawyer for each newspaper. These indivuals should be given their instruction sheets and name cards.

III. *Playing the game.*

1. Play can begin once the players have read their instructions and know where in the room they should be. When more than twenty students are participating, two newspapers will be simulated. You can draw an imaginary line down the middle of the classroom to separate the newspapers. You should instruct the students not to cross to the other side of the room.

You should also explain who everyone is and how the room has been arranged. Let the four sources of information hold up the cards indicating who they are. You should then announce that play is beginning and that reporters should talk briefly with their editors before going to talk with their sources. The players' instruction sheets will explain what is required of them to play the game. Play ends when the editors have decided to publish or not publish the story being considered.

2. The game revolves around three news stories. Most of the game will be spent with the reporters attempting to gather information from their sources. When they report back to the editor, the editor will have to decide whether the story should be printed as is or whether more information is needed. Legal issues may arise at different points and the lawyers will then be consulted. The reporters may also encounter ethical problems and will either resolve them by him/herself or ask the editor for advice. Play ends when the editor(s) decides to publish or not publish the story. The simulation should not end until the class has had an opportunity to discuss what has occurred.

3. The role of the game director is to observe the play and answer any questions that may arise. If any players seem confused, try to assist them. Play is more active, and therefore more enjoyable, when participants understand what is expected of them.

4. It will usually take less than an hour for editors to reach a decision. Keep an eye on the different groups and, if necessary, ask the editors how they are doing and what problems they are encountering. It is possible that some groups will reach a decision about publication before the end of the class. If this happens make sure that the reporter has talked to all the relevant sources of information. If a source is being uncooperative and is refusing to speak with the reporter, suggest that the reporter be persistent

and try again or that a different source might have the same information.

5. Summary of game director's responsibilities:

a. Assign roles and places and distribute instruction sheets and **Student Guides.**
b. Announce start of the game.
c. The game will generally run by itself once play has begun. Answer questions that arise and check to make sure players understand their responsibilities.
d. Tell editors when game will end and that they must tell you at that time whether they will publish the story or not.

6. Frequently asked questions.

a. WHAT HAPPENS IF THE LEGAL CODE DOES NOT PROVIDE A CLEAR ANSWER TO THE REPORTER'S QUESTION?

One of the purposes of this simulation is to teach students that law is not a perfectly predictable science. Lawyers frequently spend time in the library doing research and finding pertinent cases. Often, the rulings in the cases seem to conflict and the lawyer must then make a judgment about what is likely to happen. Students desiring to know "what the law is" should be told to read the code again and do the best they can. Their problems in analyzing the cases should be discussed later.

A word of caution: the danger in a simulation such as this one is oversimplifcation of the process of law. The Constitution, because of the inherent vagueness of many of its clauses and because of changing societal conditions, inevitably requires ongoing interpretation by the courts. For some fact situations, you may find clear answers but when the facts are changed slightly, it becomes risky to try to predict the outcome of a case. For this reason, Supreme Court decisions rarely settle a legal problem completely. Instead of ending litigation in an area, we often find that a court decision generates new cases, each of which has slightly different facts from the original case. The purpose of this game is not simply to provide the answers to a set of media law questions. Rather, the game is mainly intended to provide an opportunity to look at what influences the process of interpreting the constitution and to consider the values underlying the guaranty of a free press.

b. WOULD A REAL LAWYER IN SUCH A SITUATION HAVE MORE CASES THAN THE LEGAL CODE PROVIDES?

Yes, there may be fifty to a hundred legal cases involving some of the issues in the simulation and a lawyer would strive to be familiar with them. The purpose of this simulation is not to teach all there is to know about First Amendment law. Rather, it is designed to provide an introduction and to give students insight into the values underlying First Amendment cases. The legal code provides a sampling of what exists. Students in-

terested in a particular issue should be encouraged to research the subject further.

c. DOES THE REPORTER ACTUALLY HAVE TO WRITE HIS STORY?

No, decisions on whether to publish or not should be made on the basis of what the reporter tells the editor. As a writing assignment after the game, you may want to ask students to write the story.

IV. *Post-Game Discussion*

1. Review the game: It is important to remember that only you have an understanding of the whole game and of all the issues involved. Most students only encountered two legal issues. Each student holds one or two pieces of a jigsaw puzzle and your task in discussing the game is to enlarge the vision of each student and enable them to understand all of the issues in the simulation.

a. Ask somebody to review each story.
b. If two newspapers were simulated, compare the editorial decisions made by each editor.
c. Ask whether any players committed unethical acts or were tempted to commit unethical acts.

2. Review the legal issues in each story: ask the lawyers what legal issues arose and how they applied the cases in the legal code. The stories and legal issues are summarized below. The legal cases are explained in more detail in the legal code.

STORY 1

Reporter Gerald Gray has been assigned to prepare a story about the upcoming court hearing of Allen Sharp, an ex-C.I.A. agent accused of smuggling weapons to the Irish Republican Army and of tax evasion. The reporter has information that Sharp has agreed to a plea bargain and the reporter has been assigned to find out the terms of the agreement between the prosecutor's office and Sharp's lawyer and why each side has agreed to a guilty plea. The reporter will first try to talk to Sharp's defense lawyer (Sharp himself is not represented in the game) and get this information from him. The reporter may or may not be successful and may have to interview other characters in the game to obtain the story. The two legal issues that may arise are the following:

Legal issue 1: Access to courts

Can the press be excluded during the hearing at which Sharp will plead guilty? An analysis of the cases in the Legal Code suggests that it is unlikely that a judge would allow this. The *Gannett* case permits some pre-trial hearings to be closed but the *Richmond Newspapers* case requires that all trials be open. What is the relevance of these cases to a plea bargaining hearing? The most likely answer is that a court would say that a plea bargaining hearing is like a trial since it takes the place of a trial. The national security argument advanced by Sharp's lawyer seems implausible but a judge might accept it, exclude the press, and allow a transcript of some of the proceedings to be made public later.

Related questions:
1. Should courts ever be closed to the press and public?
2. What is wrong with secret court hearings?
3. Who should get more protection—the press or the defendant on trial?
4. Should the press be allowed free access to other public institutions e.g. prisons, mental hospitals, public schools?

Legal issue 2: Prior restraint

Can the press be barred from printing a story? It is highly unlikely that a judge would find that the standards set forth in the Pentagon Papers case have been met. There is no more difficult task for a lawyer than to obtain an injunction against a newspaper. Prior restraints are considered the most serious infringements of press freedom. What has happened occasionally in recent years is that lower court judges have temporarily enjoined publication so that they can have a little more time to review the facts of the case. Invariably, these judges either remove the injunction a day or two later or are reversed on appeal. It may be possible, therefore, to get a one or two day delay in publication even if a permanent ban is impossible.

Related questions:
1. Why are prior restraints considered the most severe infringement on press freedom?
2. What circumstances would justify a court order barring publication?

STORY 2

Reporter Susan Green has been assigned to prepare a story about ex-C.I.A. agent Sharp's alleged involvement in assassination attempts on foreign leaders. She will first interview a secretary in the prosecutor's office who has some confidential information. The secretary also has information, which she may reveal to the reporter, that criminal defense lawyer William Cross has a drinking problem.

Legal issue 1: Confidential sources

Can a reporter be forced to reveal the names of sources? The courts have not given reporters a privilege. Reporters have been put in jail even in states which had shield laws. Many judges, however, are willing to look closely at the need for the reporter's information in a particular case and to give weight to First Amendment considerations. A solicitous judge, therefore, might rule in favor of the reporter.

Related questions:
1. Why is there an attorney-client privilege?
2. Is there a shield law in your state?
3. Should there be a national shield law? How important is the protection of sources in investigative reporting?

Legal issue 2: Use of stolen documents

A newspaper may publish stolen documents but the people involved in the theft may also be punished later. In this case the reporter did not steal the documents. While he may have thought they were stolen, and could conceivably be charged with receiving stolen property, it is unlikely he would be prosecuted in this case.

This issue poses ethical as well as legal problems. Reporters can be prosecuted for both theft and for receiving stolen property. They are not immune from the criminal law. They are, however, rarely prosecuted for receiving stolen property and it is unlikely that they are guilty of any crime if they are merely told information that has been taken from a stolen document. The ethical issue is whether a newspaper should use such information. Editors will usually refuse to print information that the reporters have stolen but will be more lenient with information stolen by sources.

Related questions:
1. Should information which has been stolen ever be published by the media?

Legal issue 3: Privacy

Is it an invasion of privacy to publish information about defense lawyer William Cross' drinking problem? One of the four recognized kinds of invasion of privacy involves publishing private information about an individual that is embarrassing and not part of the public record. Such information is true (and therefore not libelous) but it is considered to be information which should be controlled by the person involved. The main defense in such cases is that the information is newsworthy. Such a defense might be raised here. If a judge were persuaded that Cross' recent drinking was a newsworthy and not totally private matter, Cross would lose. If the information were not ruled to be newsworthy, Cross might win.

Related questions:

1. Is privacy more threatened today, in an age of computer data banks and electronic journalism, than it used to be?
2. If Cross were a Congressman, would excessive drinking be newsworthy?
3. What is news and can the concept of news change over time?

STORY 3

Reporter Richard Brown has been assigned to interview Congressman George Reynolds, an ex-C.I.A. agent. The paper has received some information that Reynolds was involved in some illegal activities when he worked for the C.I.A. Reynolds has been a Congressman for four years and is currently running for reelection. Election day is in ten days. The information about Reynolds is false but the reporter will probably be unable to discover this.

Legal issue 1: Libel

Has Congressman Reynolds been libeled? The basic problem in libel cases is how to encourage the press to print controversial stories while at the same time protecting the individual's reputation. Court rulings since 1964 have tried to achieve this goal by making it harder to win libel cases in some kinds of cases, thus encouraging the press to be more willing to publish stories in these cases. Thus, public officials, (*Times v. Sullivan* case), public figures (*Butts* case) and private individuals who thrust themselves into a public controversy (*Gertz* case) must prove malice to win. (Malice means reckless disregard of truth or knowledge of falsity). Private individuals, if states so choose, can win by proving mere negligence. The central problem in many cases is who is a public official, who is a public figure, and whether the behavior of the paper violates the malice standard.

The story about Congressman Reynolds is indeed false, but the way the game is organized, the story will frequently be printed. Congressman Reynolds would be unable to win a libel suit because the newspaper believed the story to be true and did not act with malice. In the Reynolds case, untrue information has been printed about him but the newspaper would not be held responsible. He is a public official and must prove malice, that the newspaper knew the information was false or recklessly disregarded the probability that it was false. Negligent behavior on the part of the paper will not allow the Congressman to win.

Related questions:

1. Should there be different standards for public and non-public figures? Why should negligent behavior be excused when public officials or figures are the subject of news reporting?

Legal issue 2: Right of Reply

Persons attacked by newspapers are not required to be given space to reply. The Supreme Court has ruled (*Miami Herald v. Tornillo*) that the First Amendment guarantees editors the exclusive right to decide how to use space in a newspaper. Courts may not interfere with the editorial judgment of editors and the editors of the *Metrovolis Times* can, if they wish, refuse to give Reynolds space to reply.

This can be an interesting issue to discuss since some of your students may disagree with this principle. In addition, this is an issue in which television is treated differently from newspapers. The Fairness Doctrine has required television to provide free air time to persons who are attacked on the air.

Related questions:

1. Should television be granted the same First Amendment rights as newspapers?
2. Should broadcast television be treated differently from cable television?

3. What is the purpose of the First Amendment? What assumptions do we make about the impact of a free press? Evaluate the arguments identified in the **Student Guide** about the function of free expression. It is important that the focus during play on individual legal issues should not exclude discussion of more general questions of law and media. The current state of the law is important but students should also develop some understanding of the social, political, economic and technological forces that will influence media law in the future. Any period in which new communications technologies are developed is an historically important one. When attempts are made to apply old legal doctrines to newly emerging media, it is often found that the old regulatory patterns do not work very well. For example, copyright law developed after the invention of printing and is well suited to the medium of print. Copyright law is being subjected to great stress today, however, from copying machines, videotape recorders, and computers. Similarly, there will be calls to reevaluate various aspects of First Amendment doctrine as new problems arise which seem to call into question the value of free expression in particular cases. In any debate about the need for restricting the media, it is important for students to understand clearly the goals of the First Amendment and its relationship to the ideals of democratic government.

4. In lieu of a standard class discussion, you might want to approach some of these issues by simulating a city council session convened to consider a series of ordinances. Ask for volunteer city councillors and then organize the rest of the class into several groups. Ask each group to try to decide whether to support or not support each of the proposed or-

dinances. Ask each group to elect a spokesperson to testify before the City Council. If the group cannot reach a consensus, suggest that a spokesperson be chosen for each side. The ordinances can be related to the seven legal issues, e.g. Resolved: Reporters do not have to reveal sources of information for newspaper stories.

5. Consider the following: A 1980 Gallup poll indicated that 3 of 4 adults did not know what the First Amendment was or what it dealt with. Thirty seven percent said stricter legal controls on the press were necessary, 32% said current controls were "about right", 17% said current controls were too strict, and 14% had no opinion. In 1958, 21% wanted more controls, 58% disapproved more controls, and 21% had no opinion.

V. *Selected Additional Readings*

I. General

1. Barron, J.A. and Dienes, C.T., *Handbook of Free Speech and Free Press*, Boston: Little Brown (1979).

2. Blasi, V., "The Checking Value in First Amendment Theory," 3 *A.B.F. Research Journal* 521 (1977).

3. Chafee, Z., *Free Speech in the United States*, Cambridge: Harvard University Press (1941).

4. Emerson, Thomas, *The System of Freedom of Expression*, New York: Random House (1970).

5. Meiklejohn, A., *Free Speech and Its Relation To Self Government*, New York: Harper (1948).

6. Simons, H. and Califano, J.A., *The Media and the Law*, New York: Praeger (1976).

7. Stewart, P., "Or Of The Press," 26 *Hastings Law Journal* 631 (1975).

II. History

1. Eisenstein, E., *The Printing Press as an Agency of Change*, New York: Cambridge University Press (1978).

2. Levy, L.W., ed., *Freedom of the Press From Zenger to Jefferson*, Indianapolis, Bobbs-Merrill (1967).

3. Levy, L.W., *Legacy of Suppression*, Cambridge: Harvard University Press, (1960).

4. Nelson, H.L., *Freedom of the Press From Hamilton to the Warren Court*, Indianapolis: Bobbs-Merrill (1967).

5. Schwartz, B., *The Bill of Rights: A Documentary History*, New York: Chelsea House (1971).

6. Stevens, J.D., *Shaping the First Amendment: The Development of Free Expression*, Beverly Hills: Sage Publications (1982) (A concise and readable history of freedom of the press).

III. Prior Restraint

1. Friendly, F., *Minnesota Rag*, New York: Random House (1981) (story of Near v. Minnesota).

2. Knoll, E., "National Security: The Ultimate Threat to the First Amendment," 66 Minnesota Law Review 161 (1981) (The *Progressive* - hydrogen bomb case).

3. Morland, H., *The Secret That Exploded*, New York: Random House (1981) (story of *Progressive* - hydrogen bomb case).

4. Ungar, S., *The Papers and The Papers: An Account of the Legal and Political Battle Over the Pentagon Papers*, New York: Dutton (1972).

Cases:

Near v. Minnesota, 283 U.S. 697 (1925) (Prior restraint)
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) (Prior restraint and fair press - free trial).
New York Times Co. v. United States, 403 U.S. 713 (1971) (Prior restraint - Pentagon Papers case).

IV. Libel

Cases:

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Libel - public officials).
Curtis Publishing Company v. Butts, 388 U.S. 130 (1967) (Libel - public figures).
Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974) (public figures)
Hutchinson v. Proxmire, 443 U.S. 11 (1979) (public figures)

V. Privacy

1. Warren, S. and Brandeis, L., "The Right of Privacy," 4 *Harvard Law Review* 193 (1890).

2. Miller, A.R., *The Assault on Privacy*, Ann Arbor: University of Michigan Press (1971).

3. Pember, D.R., *Privacy and the Press*, Seattle: University of Washington Press (1972).

4. Prosser, William L., "Privacy," 48 *California Law Review* 382 (1960).

5. Westin, A., *Privacy and Freedom*, New York: Atheneum (1967).

6. Burnham, David, *The Rise of the Computer State*, New York: Random House (1983).

Cases:

Time v. Hill, 385 U.S. 374 (1967).
Dietemann v. Time, Inc., 449 F. 2d. 245 (1971).

VI. Free Press-Fair Trial

Cases:

Sheppard v. Maxwell, 384 U.S. 333 (1963) (undue publicity and free press-fair trial).

Gannett v. DePasquale, 443 U.S. 368 (1979) (closed courtroom - pre-trial suppression hearing).
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980 (closed courtroom - criminal trial).
Chandler v. Florida, 449 U.S. 560 (1981) (television cameras in court).

VII. Protecting Confidential Sources

1. Blasi, V., "The Newsman's Privilege: An Empirical Study," 70 *Michigan Law Review* 229 (1971).

2. Farber, M.A., *Somebody is Lying: The Story of Dr. X*, New York; Doubleday (1982).

Cases:

Branzburg v. Hayes, 408 U.S. 665 (1972).
Herbert v. Lando, 441 U.S. 153 (1979).
Zurcher v. Stanford Daily, 436 U.S. 547 (1978).
United States v. Nixon, 418 U.S. 683 (1974) (Supreme Court rejected claim of executive privilege.)

VIII. Right of Reply

1. Barron, J., *Freedom of the Press For Whom?* Bloomington: Indiana University Press (1973).

2. Friendly, F., *The Good Guys, The Bad Guys, and The First Amendment*, New York: Random House (1975).

3. Schmidt, B., *Freedom of the Press vs. Public Access*, New York: Praeger (1976).

Cases:

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (Right of reply).
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (Fairness Doctrine).

IX. Miscellaneous

1. Hirst, D., "Freedom of the Press, English Style," in Jones, Harry, ed., *Legal Institutions Today: English and American Approaches Compared*, Chicago: American Bar Association (1977) (how English law treats the press).

2. Cowan, Geoffrey, *See No Evil*, New York: Simon and Schuster (1979) (the controversy over the attempt to impose a family viewing hour on television).

3. Epstein, E.J., *News From Nowhere*, New York: Random House (1973).

4. McLuhan, M., *Understanding Media*, New York: McGraw-Hill (1963).

5. Pool, Ithiel de Sola, *Technologies of Freedom*, Cambridge: Harvard University Press (1983).

6. Schwartz, Tony, *Media: The Second God*, Garden City: Anchor Books (1983)

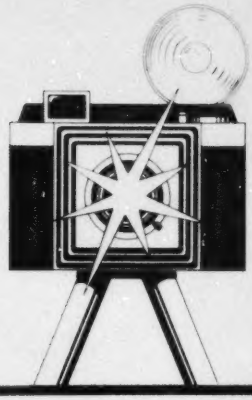
7. Bagdikian, B., *The Media Monopoly*, Boston: Beacon Press (1983).

8. *The News Media and The Law*, Magazine about recent developments in press law, published quarterly by *The Reporter's Committee on Freedom of the Press*, 800 18th St., N.W., Washington, D.C. 20006.

9. *The Constitution: That Delicate Balance*—A series of films made for public televsion about hypothetical legal issues. They are available from Media and Society Seminars, Columbia University School of Journalism, New York, New York 10027.

Student Guide

TO FREEDOM OF THE PRESS



"When People talk of the Freedom of Writing, Speaking or Thinking I cannot choose but laugh. No such thing ever existed. No such thing now exists; but I hope it will exist. But it must be hundreds of years after you and I shall write and speak no more."

Letter from John Adams to Thomas Jefferson, July 15, 1817

You will soon be playing a simulation game involving the First Amendment to the Constitution. Although the First Amendment protects freedom of speech, religion and the press, this game mainly involves freedom of the press and issues of law and journalism. There are roles for reporters, editors, lawyers and people who have newsworthy information. When you know which role you are going to assume, your teacher will give you some more specific information about exactly what you should do to make the simulation work well. The game has been designed to be an enjoyable experience for you as well as an informative and educational one.

What roles does the press perform in a democratic society? Why should the Constitution protect the press? How should conflicts between the press and the government be resolved? How free should the media be from government regulation? What protection should be given to individuals who are targets of press inquiries and attacks? How much power should the press have? The purpose of this simulation is to let you experience some of the decisions and dilemmas that are faced by lawyers and journalists. As you play the game you will develop a clearer understanding of the role that law plays in trying, not always successfully, to protect press rights, individual rights, and the efficient functioning of government.

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I. How Old Is the Concept of Freedom of the Press?

Legal protection for the news media is not an ancient concept. Newspapers themselves are not a particularly old institution since the process of printing was only developed in Western Europe in the mid-1400's. The first English language daily newspaper did not appear in London until 1702. The first American newspaper, *Publick Occurances*, was published in 1690. It was immediately suppressed by Boston authorities and no further issues were printed. In 1704, the *Boston News-Letter* became the first regularly published newspaper in the colonies.

Prior to the invention of printing, there was no great need for laws involving communication. Not many people could write and, therefore, writing was not a tool that threatened the powerful institutions of medieval society. Printing, however, was quickly recognized to be a potential threat to those in authority. Printing made possible communication among large numbers of people in different places and the spreading of ideas critical of those in power. Legal restrictions were placed on the printing press, therefore, soon after its invention. In 1529, for example, Henry VII issued a proclamation banning certain books which were odious to him or to the clergy who advised him.

In England there were three principal methods for controlling publishing:

1. **Licensing**—Only people who received permission from the government were allowed to print and publish. A comparable policy today would limit the number of offices that could have copying machines and would require government approval before one could be installed. This licensing system did not end in England until 1697.

2. **Taxation**—From 1712 until 1855, through the Stamp Act, a tax was imposed on newspapers.

3. **Libel**—Severe punishments were inflicted on persons publishing criticisms of the government. Truth was not a defense. In the famous trial of John Peter Zenger in 1735, Zenger admitted publishing a criticism of the government, an admission tantamount to a plea of guilty since the prosecution merely had to prove that the item had been published. Yet, the jury ignored the law and acquitted Zenger anyway.

All of these means for interfering with press freedom were employed in the colonies. At the Constitutional Convention in 1787, the issue of the need for a guarantee of press freedom was heatedly debated. Alexander Hamilton concluded that it was unnecessary, since the federal government had not been given the power to interfere with the press. Yet, four years later, proponents of the Bill of Rights were more successful, and the First Amendment was enacted.

II. *What Do You Believe About Freedom of the Press?*

The purpose of this simulation game is to provide you with an opportunity to experience a range of issues and problems. Courts do not consider constitutional guarantees in the abstact; rather, they decide specific cases involving real people. When you play the game, you will probably encounter some of the following issues and will have to decide which of several competing and worthwhile interests should be upheld. What do you think should happen in each case?

1. A person is being prosecuted for murder. One of the key pieces of evidence at the trial will be the murder weapon, which was found by the police at the defendant's home. The defense lawyer believes that the search of the house was illegal and, therefore, that the judge should not allow the weapon to be shown to the jury at the trial. The defense lawyer will make this request at a hearing sometime before the trial begins and wants this hearing to be closed to the press and public. He does not want potential jurors to read about the weapon in the newspapers and thus impair the client's right to a fair trial. Several newspapers demand admission to the courtroom, citing the First Amendment. Should a judge close the courtroom during the hearing?

2. In a city of 150,000 people with one morning and one afternoon newspaper, Ed Robinson, the president of the public school teacher's union, is running for a seat on the City Council. Three weeks before the election, the newspaper endorsed Ed's opponent and charged that Ed has damaged public education, was never a good classroom teacher, and would hurt taxpayers by voting more money for teacher's salaries and for schools. Ed feels that these are misleading charges and writes a letter to the editor presenting his side on these issues. The newspaper refuses to print this and anything else by the candidate. Should a court order the newapaper to do so?

3. Martha Lifer is state chairperson of the right to life committee. Her daughter, Gloria, has also signed petitions supporting a constitutional admendment to bar abortions. A reporter learns that Gloria had an abortion ten years ago. When interviewed about this, the daughter says it is a private matter and that she will sue for invasion of privacy if the story is published. Would you rule in her favor?

4. A series of newspapers articles by reporter Tyrone Barber brings to light a series of unusual deaths at a local hospital. The final article quotes unnamed sources as believing that Dr. Phil Pusher has been negligent in the treatment of some patients. Pusher is indicted for manslaughter and Pusher's lawyer asks a judge to order Barber to turn over all of his notes in order to allow the lawyer to prepare fully for trial. The reporter says that he promised his sources confidentiality and that they only spoke to him after he had made this promise. Should the court order Barber to reveal his sources?

5. False information about a movie star is printed in a magazine. She claims that it has damaged her reputation. The magazine claims that it believed the story was true when it printed it. Should she be able to collect for libel?

6. A businessman learns that the local newspaper will claim in a story to be printed tomorrow that he is involved in organized crime. The story is not true. It is the result of a smear campaign begun by one of his competitors. Should the businessman be able to get a court order prohibiting publication of the story?

III. *What Protection Does the First Amendment Provide To The Press?*

It is important to understand that the First Amendment does not confer absolute protection on the press. Justice Hugo Black often said that the words of the Constitution, "Congress shall pass no law . . ." should be taken literally and that all restrictions on the press should be ruled illegal. This view has never prevailed, however, and the task of constitutional lawyers is to determine the small number of situations in which some interference with the press will be permitted.

The First Amendment is a powerful force that is present in almost every case involving the press. The First Amendment does not guarantee that the press will win every time it ends up in court, but it is an exceedingly important ally for the press. The First Amendment is a constant reminder to judges that restrictions on the press should not be imposed frivolously, that the press performs a vital role in a democratic society and that, all other things being equal, a judge should probably rule in favor of the press.

The First Amendment protects the press but it does not list or define all of the activities that are protected. When judges are forced to decide whether a general standard like "freedom of the press" should be applied in a particular case, they often look at what other judges have ruled in similar cases as well as what the people who wrote the law intended it to mean. In this instance, judges are not helped by looking at what the framers of the Constitution intended. The framers endorsed the general concept of a free press and probably agreed that censorship of publications would no longer be allowed. At the same time, however, they were willing to allow punishment for people who criticized government. Historian Leonard Levy has written

> *The question . . . is not whether freedom of the press was favored but what it meant and whether its advocates would extend it to a political opponent whose criticism cut to the bone on issues that counted. Jefferson once remarked that he did not care whether his neighbor said that there are twenty Gods or no God, because "It neither picks my pocket nor breaks my leg." But in drafting a constitution for Virginia in 1776 he proposed that freedom of religion "shall not be held to justify any seditious preaching or conversation against the authority of the civil government." And in the same year he helped frame a statute on treasonable crimes, punishing anyone who "by any word" or deed defended the cause of Great Britain. Apparently political opinions could break his leg or pick his pocket, thus raising the question of what he meant by freedom of the press. We can say that he and his contemporaries supported an unrestricted public discussion of issues if we understand that "unrestricted" meant merely the absence of censorship*

in advance of publications: no one needed a government license to express himself, but he was accountable under the criminal law for abuse of his right to speak or publish freely.

In 1798, less than ten years after the adoption of the First Amendment, Congress passed the Sedition Act which authorized a fine or imprisonment for anyone who "shall write, print, utter or publish . . . any false, scandalous and malicious writing . . . against the government of the United States, or either house of congress . . . or the President . . . with intent to defame . . . or to excite against them . . . hatred of the good people of the United States . . ." To his credit, Jefferson objected to this legislation. Between 1798 and 1801, when the act expired, twenty-five persons were arrested and ten were convicted.

IV. *What is the purpose of the First Amendment*

Even after two hundred years, there is still no general agreement about what the First Amendment is supposed to do and what it is meant to accomplish. Some theories stress the impact of free expression on individuals and some focus on how society and political institutions are affected. Professor Thomas Emerson of the Yale Law School has identified four goals of the system of free expression. These are:

1. Freedom of expression makes possible individual self-fulfillment. It is needed for human beings to realize their potential, to learn as much as they are capable of learning, and to make the most of their abilities.

2. Freedom of expression is needed to advance knowledge and discover truth. The late Federal Judge Learned Hand once wrote,

> *The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all.*

A few centuries earlier, John Milton asserted,

> *And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"*

3. Freedom of expression is necessary to allow citizens to participate in their government. According to Professor Emerson, "the crucial point . . . is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government." Similarly, Thomas Jefferson once wrote,

> *The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate a moment to prefer the latter. But I mean that every man should receive these papers, and be capable of reading them.*

Some scholars who believe that this is the basis of free expression have contended that speech which is political in nature deserves absolute protection whereas private or commercial speech, such as advertisements, may be regulated in some ways.

4. Freedom of expression promotes a more stable and adaptable community. It is a safety valve that allows dissenters to let off steam and reduce frustration, and, thereby, lessens the possibility of violent reac-

tions. As stated by Federal District Court Judge Murray Gurfein in the Pentagon Papers case,

> *The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitious press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know . . . These are troubled times. There is no greater safety valve for discontent and cynicism about the affairs of Government than freedom of expression in any form.*

IV. *Modern problems of law and media*

Two problems that our legal and political systems will be struggling with for years to come should be considered in any discussion of law and the press. These are the growth of large media organizations and the rise of television and other electronic media. These two issues will not be dealt with directly during the playing of the simulation but they should be discussed afterwards.

1. Growth of media organizations

In 1895, Oscar Wilde wrote that,

> *"Somebody—was it Burke?—called Journalism the fourth estate. That was true at the time, no doubt. But at the present moment it really is the only estate. It has eaten up the other three. The Lords Temporal say nothing, the Lords Spiritual have nothing to say, and the House of Commons has nothing to say and says it. We are dominated by Journalism. In America the President reigns for four years, and Journalism governs for ever and ever."*

Wilde might have even more sarcastic observations if he were alive today. In 1790, there were eight daily newspapers in the United States. By 1850, the number of papers had risen to 387. By 1900, there were 2,190 and in 1910 it reached 2,433. From this peak, the number began to decline, to 2,042 in 1920, to 1,878 in 1940 and to 1780 in the 1970s. Perhaps more important than these numbers is the recent dominance of large newspaper chains in the newspaper industry. Of the 1780 daily papers in 1978, approximately two-thirds were owned by chains. The twenty five largest chains controlled 52% of all the papers sold daily in the United States. For the cities where chains own newspapers, it is hard to find competing papers. Fewer than fifty of the more than 1000 papers owned by chains have any competition and fewer than ten have face-to-face competition at the same time of day. This trend has troubled many students of freedom of the press since it means that there will be fewer outlets for divergent views and greater possibility for manipulation of public opinion by large media corporations.

2. The Rise of Televison

The growth of television during the last forty years has been extraordinary. In 1948, the number of television sets in the United States increased from 100,000 to 1,000,000. By 1958, the number had risen to 50,000,000. During this time, television also became one of the most influential forces in the lives of most people. In New York State, the television set has even attained the legal status of a necessity of life. It is against

the law in New York to appropriate a television set to satisfy a money judgment since, like clothes and cooking equipment, it is considered one of the "utensils necessary for the judgment debtor and family." Television is a powerful cultural force and its power is felt both directly and indirectly. As sociologist Rose Goldsen has noted, "it is still possible to turn off the television set. It is no longer possible to turn off the television environment."

According to recent studies, television is the main source of news for more than 75% of the population and the only source of news for more than 50% of the population. It is important to ask, therefore, whether and how the First Amendment should apply to television. Should television journalists enjoy the same protection provided to the print media? If not, why should television receive less protection?

Although many may argue that television should enjoy complete First Amendment protection, that is not currently the case. In the early days of radio, it was realized that there were a limited number of frequencies on the broadcast spectrum. If too many stations are broadcasting at the same time, there will be a great deal of interference and you will not be able to see or hear anything clearly. For this reason, Congress required anyone wishing to own a television station to obtain a license or permission from the government. This is not the case for persons desiring to begin a newspaper or magazine.

In other, more subtle ways, television is also regulated in ways that print is not. For example, television cameras can be excluded from courtrooms if the state wishes to do so, indecent programs can be banned from being broadcast, and persons attacked on television can demand time to reply when they could not require a newspaper to provide them space for rebuttal.

It is clear that during television's first fifty years, the law has been struggling to understand this new technology and deal with the problems caused by it. It is not clear that even today we understand all of the effects of television on society and on individuals and it is not surprising that the law would move cautiously in confronting the phenomenon of television. Yet, the power of the First Amendment is such that television has already received most of the legal protection afforded to newspapers and it would not be surprising to see it declared equal in all respects during the next few years.

The phenomenal growth of television may be matched in the next few decades by an enormous increase in home computers. Cable television, which transmits signals through wires rather than through the air, does not have the problem of a limited number of frequencies, and is also growing rapidly. Many homes have videotape recorders or videodisc players which can play pre-recorded programs. Most importantly, we will be witnessing the link-up of the home computer with the television set and the creation of new uses for the television screen. The important question

is whether these new forms of communication should be regulated and, if so, how? Should we grant any process of communication the freedom from governmental interference that is the essence of the First Amendment? Or, should we examine the changes that are occurring, the impact they are having, and the problems they are causing, and permit government to propose remedies for them? Traditionally, the First Amendment stands for the principle that the temptation to regulate the media should be resisted. It is felt that legal restrictions on communication will cause more damage than the problem which has provoked the lawmakers. Yet, as the new media grow and take hold, attemps to regulate them will undoubtedly take place. Questions will be raised about who will control the new communications technologies, who will have access to them, what regulation of content should be allowed, and how individual privacy will be affected. The First Amendment has been called a "growth industry" because there have been more and more court cases involving free expression in recent years. As the new media come to play a larger and larger role in our lives, we can expect this trend to continue.

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Amendment I, U.S. Constitution

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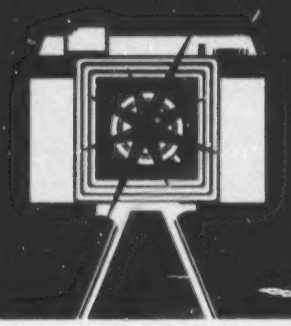
Legal Code

FREEDOM OF THE PRESS



The legal code provides cases and information on the following subjects:

1. **Access to courts** - Can the press and/or the public be barred from attending a court hearing or trial?
2. **Prior Restraint** - What is prior restraint? Can the government prohibit a newspaper from publishing a story?
3. **Confidential sources** - Can a judge order a reporter to reveal the names of sources who have given him information?
4. **Stolen documents** - Can a reporter use stolen documents in his/her story?
5. **Privacy** - When can a person sue for invasion of privacy?
6. **Libel** - If a newspaper publishes false information that damages a person's reputation, can the newspaper be sued for damages?
7. **Right of reply** - Can a person who is attacked in a newspaper demand space to present his side of the story?

To make a judgment about whether some act is lawful or not you should do the following:

1. Turn to the appropriate section of the legal code.
2. Read the case summaries.
3. See which cases most clearly resemble the facts of your case.
4. Analyze which side the rulings in the cases seem to support.

Issue I. Access to Courts

Can the press and/or public be barred from attending a court hearing?

Cases:

Gannett Co. v. De Pasquale, 443 U.S. 368 (1979). The Supreme Court ruled that the press can be expelled from some pre-trial hearings if the defense lawyer, prosecutor, and judge agree. The hearing in this case involved the question of whether an involuntary confession and a gun which had been found as a result of the confession, could be introduced as evidence at the defendant's trial. Because public knowledge of the confession and the gun could prejudice the defendant's right to a fair trial by an impartial jury, the Court permitted the hearing to be closed. The Court ruled that for this kind of a pre-trial hearing, the defendant's right to a fair trial took precedence over the right of the press to gather information.

Richmond Newspapers, Inc., v. Commonwealth of Virginia, 448 U.S. 555 (1980). The Court held, by a 7 - 1 vote, that criminal trials cannot be closed to the press and public.

Summary

1. Closed pre-trial hearings have sometimes been permitted when the judge finds that the right of the defendant to a fair trial should take precedence over the First Amendment rights of the press.
2. Criminal trials generally must remain open.

Issue 2: Prior Restraint

Prior restraint involves an order by a judge prohibiting a newspaper from publishing a particular story.

Cases:

Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976). Six members of a family were found murdered in Sutherland, Nebraska, a town of 850 people. Due to concern over the difficulty of selecting an impartial jury, the court prohibited newspapers from reporting about various aspects of the

case or the person arrested for the crime. The Supreme Court held that this order violated the First Amendment, that other means should have been tried to protect the defendants rights and that "the barriers to prior restraint remain high and the presumption againts its use continues intact."

Near v. Minnesota, 283 U.S. 697 (1931). In the first case in which the Supreme Court invalidated a state statute because it violated the First and Fourteenth Amendment, the Court refused to stop publication of "malicious, scandalous and defamatory" newspapers and magazines and denounced prior restraints as being contrary to the First Amendment. Yet, the Court also admitted that there "are exceptional situations in which prior restraint would be permitted. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of community life may be protected against incitements to acts of violence and the overthrow by force of orderly government."

New York Times Co. v United States 403 U.S. 713 (1971). In the Pentagon Papers case, the Supreme Court refused to bar publication of a secret Defense Department study of the Vietnam War. The Court noted that "any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." Justice Stewart, in a concurring opinion, indicated that publication should be prohibited only when disclosure "will surely result in direct, immediate, and irreparrable damage to our nation or its people."

Snepp v. United States, 444 U.S. 507 (1980). The government sued to bar publication of a book by an ex-C.I.A. agent. The book contained information the author learned while working at the C.I.A. but it was not classified information. Employees of the C.I.A. have a contract in which they agree not to write such books and the courts ruled that a restraint on publication was permissable, because Snepp had violated this contract.

United States of America v. The Progressive, 467 F. Supp. 990 (1979). A federal district court judge barred *The Progressive* magazine from publishing an article describing how to build a hydrogen bomb. The judge stated that there was a "likelihood of direct, immediate, and irreparable injury to our nation." The case was never reviewed by a higher court because the article was published elsewhere.

Issue 3: Confidential Sources

Can a reporter be ordered to reveal in court who his sources are?

In **Branzburg v. Hayes,** 408 U.S. 655 (1972), four justices opposed allowing reporters a privilege to protect sources, four justices supported it and Justice Lewis Powell recommended a "qualified privilege". He wrote,

> *"...the asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case by case basis accords with the tried and traditional way of adjudicating such questions."*

In recent years there has been an increase in government attempts to discover reporters' sources of information. Justice Powell's suggestion of balancing the interests of reporters with the rights of the individuals who want to know who the sources are, has been followed in some cases and rejected in others. The outcome of such cases often depends upon the judge's evaluation of the need for a privilege in the case under review. If a judge is persuaded that the information is not necessary, it is possible that he will rule in favor of the reporter. But particularly in criminal cases when the reporter is called before a grand jury to testify, it is unlikely that the reporter will be allowed to claim a privilege to refuse to reveal sources.

Issue 4: Use of stolen documents

A newspaper may publish stolen documents but the people involved in the theft may also be punished later if they are caught. Most editors would refuse to publish documents which they know was stolen by a reporter.

Reporters can be prosecuted for both theft and for receiving stolen property. They are not immune from the criminal law. In fact, however, they are rarely prosecuted for receiving stolen property and it is unlikely that they are guilty of any crime if they are merely told information that has been taken from a stolen document.

Issue 5: Invasion of Privacy

When can a person sue a newspaper for invading his/her privacy? Most courts have recognized four kinds of invasion of privacy.

1. Using another person's name or likeness without permission to advertise a product.

2. Eavesdropping, trespassing, entering, or taking pictures in a person's home without consent of the owner. In one case, two reporters investigating medical quackery entered the subject's house pretending to be potential patients. Actually, the police had wired them with transmitters and they secretly took pictures of the inside of the house. A court ruled that this was an invasion of privacy (**Dietmann v. Time, Inc.**, 499 F.2d 245 [1971]).

3. Publishing information about an individual which places the person in a false light in the public mind. This type of case is typified by novelizations of actual stories and the objection by a participant in the real story that he/she has been depicted inaccurately in the fictional version.

4. Publishing private information about an individual that is embarrassing and not part of the public record.

In most cases, the person whose privacy is invaded does not claim that the article was false. Rather, he/she feels that the information, even though true, should not be permitted to be made public in the news media. The claim is that the information is not newsworthy and, therefore, should be under control of the person involved. If the story is newsworthy, newspapers do have a right to print the story. The key issue in many privacy cases, therefore, is whether or not the material is newsworthy.

Issue 6: Libel

Libel is the publication of false information that damages a person's reputation.

Cases:

New York Times v. Sullivan, 376 U.S. 254 (1964). The Supreme Court ruled that for public officials to win a libel suit they must not only show that the printed material was false but that the "statement was made with 'actual malice'--that is with the knowledge that it was false or with reckless disregard of whether it was false or not."

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). A magazine article accused Butts, the University of Georgia football coach, of disclosing his game plan to an opposing coach. Butts sued for libel and the court ruled that public figures, as well as public officials, needed to prove malice (knowledge that it was false or reckless disregard of the truth) to win a libel suit. Chief Justice Warren wrote that "to me, differentiation between 'public figures' and 'public officials' and adoption of separate standards for proof of each has no basis in law, logic or the First Amendment."

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Gertz was a lawyer who represented the family of a youth killed by a Chicago policeman. In an article in a John Birch Society magazine, Gertz was portrayed as the architect of a plot to frame the police officer. It also falsely asserted that he had a long police record, and was an official of the Marxist League for Industrial Democracy. The Court ruled that,

1. Gertz was not a public figure.
2. Private individuals generally do not have to prove malice to win a libel judgment.
3. If a private individual voluntarily thrusts himself into the center of a newsworthy public controversy, he must prove malice to win the case.

Summary

1. Public officals and public figures must prove malice before they can win a libel suit. A private figure can win such a suit merely by showing that the article was false, that he was damaged by it, and that the newspaper had been negligent in printing it.

2. Frequently, it is hard to determine whether someone should be considered a public figure or a private individual. In several cases, the Supreme Court has required that the individual must voluntarily thrust himself into the controversy before he may be categorized as public figure.

Issue 7: Right of Reply

If a person is attacked in a newspaper must he be given space in the paper to defend himself?

Cases:

Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969). The Supreme Court upheld the constitutionality of the Fairness Doctrine. This doctrine required that when a televised per-

sonal attack is made on an individual involved in a public issue, that person must be given air time to respond.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). A Florida law granted political candidates a right to equal space to reply to newspaper criticism and attacks on their records. The Supreme Court unanimously held that such a law violates the guarantees of a free press. The Court held that the government cannot tell newspapers or editors what may or may not be printed in the paper.

Summary

1. Individuals attacked on television can demand air time to respond.
2. Individuals attacked in a newspaper article or editorial may be refused space to reply if the newspaper wishes to do so.

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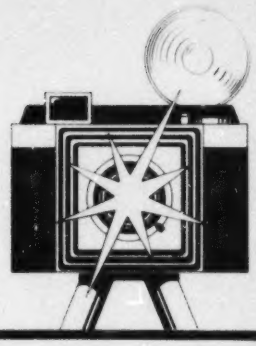
Prosecutor

Secretary

Congressman

Criminal Defense Lawyer

Reporter Gray's
INSTRUCTIONS



DO NOT SHOW THIS TO ANY OTHER PLAYERS

YOU ARE GERALD GRAY AND YOU WORK FOR THE *METROPOLIS TIMES*. Along with two of the newspaper's other investigative reporters you are preparing a story on ex-C.I.A. agents. A fellow reporter, Richard Brown, is looking into charges that a Congressman now running for reelection, George Reynolds, was involved in an illegal domestic surveillance and wiretapping program when he worked for the C.I.A. Reporter Susan Green is investigating a tip she received that ex-C.I.A. agent Allen Sharp was involved in a recent assassination attempt on a Middle Eastern leader. The leader was paralyzed from the waist down but is still in power. In the past seven months, Sharp has been arrested for smuggling guns to the Irish Republican Army and indicted for tax evasion. He is scheduled to go on trial in three weeks.

You have also been following the Sharp case and a source of yours at the local courthouse told you this morning that Sharp's name is on the court calendar for the day after tomorrow. Your guess is that he may have agreed to plead guilty to the gun smuggling charges. Your editor has assigned you to interview Sharp and his lawyer and try to find out the terms of the plea bargain.*

You called Sharp but he refused to speak with you and recommended that you contact his lawyer. When the game begins, you should briefly discuss your story with your editor and then find and interview the criminal defense lawyer. Among the issues that you might inquire about are the following:

1. Will Sharp plead guilty? To what charges? What sentence will he receive?
2. Why did the prosecutor agree to plea bargain?
3. Is it true that Sharp was involved in an assassination attempt on a foreign leader? Was the C.I.A. involved?

**Plea bargaining is a process whereby a person accused of a crime pleads guilty in exchange for a reduced sentence or a lesser charge.*

Your deadline for filing your story is approaching quickly and you should report back to your editor as soon as possible. Your task in talking with Sharp's lawyer seems fairly simple but your experience tells you that the unexpected frequently happens. You have been a reporter for ten years and you believe strongly in the obligation of the press to keep the public informed. You have seen many instances of government abusing its power and you feel gratified that you have exposed several cases of corruption. You strongly believe in the right of the press to publish what it feels is necessary to keep the public informed. You feel that the government labels documents "secret" or "confidential" more often than they should. In dealing with William Cross, Sharp's lawyer, you know similarly that he will be trying to protect his client and manipulate you to benefit Sharp. If you have any difficulties or questions during the interview, feel free to tell Cross that you need to consult your editor and that you will get back to him. Similarly, if you encounter any legal problems that you need to get advice on, consult the newspaper's lawyer who will be sitting with your editor.

Summary of Reporter's Responsibilities

1. Find your source and interview him. Have paper and pencil ready and take notes when appropriate.
2. Obtain as much information as possible from him and judge whether it is reliable and true.
3. Feel free to talk to the other reporters and participants in the game if you feel that it might help you.
4. When you finish your interview, report back to your editor with a recommendation of whether to publish the story or not. If you have any legal questions, ask the newspaper lawyer, who will be sitting with your editor.

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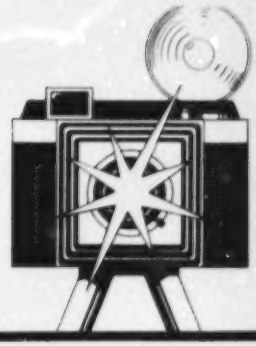
Reporter Green's
INSTRUCTIONS



DO NOT SHOW THIS TO ANY OTHER PLAYERS

YOU ARE SUSAN GREEN, A REPORTER FOR THE *METROPOLIS TIMES*. Along with two of the newspaper's other investigative reporters you are preparing a story on ex-C.I.A. agents. A fellow reporter, Richard Brown, is looking into charges that a Congressman now running for reelection, George Reynolds, was involved in an illegal domestic surveillance and wiretapping program when he worked for the C.I.A. Reporter Gerald Gray is looking into the court hearing that has been scheduled for ex-agent Allan Sharp for the day after tomorrow. In the past seven months, Sharp has been arrested for smuggling guns to the Irish Republican Army and he has been indicted for tax evasion. He was scheduled to go on trial in three weeks.

Yesterday, you received a telephone call from someone who claimed to have information that ex-agent Allan Sharp may have been involved in assassination attempts on foreign leaders. The caller, who initially refused to identify herself, later acknowledged that she was a secretary in the prosecutor's office. She has agreed to meet with you today. When the game begins, you should briefly discuss your story with your editor and then look for the secretary and ask her about her information. In conducting this interview, your job is to obtain as much information from her as possible, judge whether it is valid, and report back to your editor (the Game Director will show you who he/she is) with a recommendation of whether to publish your story or not.

You are eager to obtain the information but you are also wary about such sources of information. Why would this person volunteer such information? You have heard of Sharp and know that he was arrested for smuggling arms to the Irish Republican Army. You would not be surprised if he were involved in other para-military enterprises. Yet, you must be certain that the information you are getting is true before it can be published.

Based on your experience with such situations in the past, you know that you may encounter some of the following problems:

1. You will have to try to persuade the source to reveal as much information as she knows. Your goal is to get the source to volunteer her information with no strings attached. You will certainly refuse to pay for it. If you think the information is important, you might be willing to promise the source confidentiality. You know, however, that in your state, reporters can be ordered in court to divulge the name of a source. You believe that this is a bad law and that reporters should be able to protect their sources in order to encourage people to come forward with newsworthy information. You know one journalist who went to jail for contempt of court rather than reveal a source and you would be prepared, if the story is important enough, to do the same.

2. Your major concern is to be sure that the information you are getting is true. Is the source telling the truth? What are her motives? Is there any way of corroborating her story? Is there anyone else with the same information whom you can talk to? Does she have any documents that support what she says? These are some of the questions that you plan to ask her.

3. You are aware that in some situations there may be legal problems for you, the source and your newspaper. The source, if they ever discover who she is, could be prosecuted for theft if she has stolen anything. You might be prosecuted for receiving stolen property. If secret classified government documents are involved, you can have other problems. You keep these concerns in mind but they are not a major problem for you. Your major goal is to find true information and to bring it before the public. Any penalties to be paid can be worried about later. If, at any time during the game, you

have a legal question, consult the lawyer assigned to your case (the Game Director will show you who the lawyer is).

Summary of Reporter's Responsibilities

1. Find the Secretary and interview her. Have paper and pencil ready and take notes when appropriate.
2. Obtain as much information as possible from her and judge whether it is reliable and true.
3. Feel free to talk to the other reporters and participants in the game if you feel that it might help you.
4. When you finish your interview, report back to your editor with a recommendation of whether to publish the story or not. If you have any legal questions, ask the newspaper lawyer, who will be sitting with your editor.

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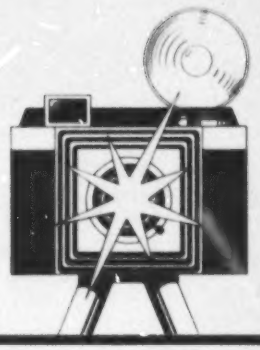
Reporter Brown's INSTRUCTIONS



DO NOT SHOW THIS TO ANY OTHER PLAYERS

YOU ARE RICHARD BROWN, A REPORTER FOR THE *METROPOLIS TIMES*. Along with two of the newspaper's other investigative reporters, you are preparing a story on ex-C.I.A. agents. Reporter Susan Green in investigating a tip she received that ex-C.I.A. agent Allen Sharp was involved in a recent assassination attempt on a Middle Eastern leader. The leader was paralyzed from the waist down but is still in power. In the past seven months, Sharp has been arrested for smuggling guns to the Irish Republican Army and indicted for tax evasion. He is scheduled to go on trial in three weeks. Another fellow reporter, Gerald Gray, is looking into the court hearing that has been scheduled for Sharp for the day after tomorrow.

You are writing a story about Congressman George Reynolds, who worked for the C.I.A. for ten years. After leaving the C.I.A., Reynolds practiced law, until being elected to Congress four years ago. He is now running for re-election. Although Reynolds is favored to win, the race is close. Election day is ten days from now.

Four days ago, you received a telephone call claiming that Reynolds had been involved in some illegal activities while he worked for the C.I.A. The caller, who would not give his name, said that Reynolds had participated in wiretapping and surveillance of dissident groups in the United States, activities prohibited by law. The caller said that you would be receiving documents in the mail substantiating the charge. Two days later, you received a copy of a memo allegedly signed by Reynolds, stamped "Top Secret" on top. The memo stated that a wiretap had revealed that one left-wing group had received money from a foreign government. It recommended that surveillance of this group be continued and that the agency attempt to infiltrate the group with undercover agents.

The memo appears to be authentic but you cannot be certain it is. When you received another telephone call from your source, you told him that you needed to verify the information before it could be published. The source suggested contacting John Forrester and Allen Sharp. Forrester and Sharp are also ex-C.I.A. agents. You called Forrester and he agreed to speak with you only if you promised him confidentiality. You agreed and he said that he did not know about the memo but he had heard of the wiretapping program and had been told once that Reynolds was involved in it. When he looked at the memo, he said it looked authentic. You then tried to contact Sharp, who is out on bail awaiting trial on charges of smuggling weapons to the Irish Republican Army. He refused to talk with you and suggested that you call his criminal defense lawyer, William Cross.

You also called the press information office at the C.I.A. The head of the press office denied that any domestic surveillance program had been carried out by the C.I.A. during Reynolds' tenure there. He indicated that such a program was illegal and against agency policy.

You have decided to interview Congressman Reynolds and ask him about it. When the game begins, you should briefly discuss your story with your editor and then look for the Congressman and ask him about his responsibilities when he was employed by the C.I.A. If you have any difficulties or questions during the interview, feel free to talk with your editor about them. Similarly, if you encounter any legal problems that you need to get advice on, consult the newspaper's lawyer who will be sitting with your editor.

Summary of Reporter's Responsibilities

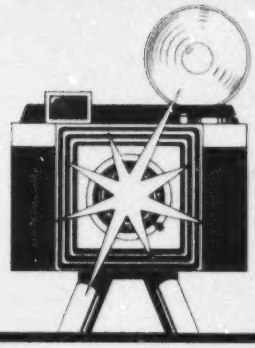
1. Find your source and interview him. Have paper and pencil ready and take notes when appropriate.

2. Obtain as much information as possible from him and judge whether it is reliable and true.

3. Feel free to talk to the other reporters and participants in the game, particularly the criminal defense lawyer, if you feel that it might help you.

4. When you finish your interview, report back to your editor with a recommendation of whether to publish the story or not. If you have any legal questions, ask the newspaper lawyer, who will be sitting with your editor. © 1983 Legal Studies Simulations

Editor's INSTRUCTIONS



DO NOT SHOW THIS TO ANY OTHER PLAYERS

YOU ARE AN ASSISTANT EDITOR FOR THE *METROPOLIS TIMES*, a major national newspaper. Your paper is doing a series of articles on ex-C.I.A. agents and you are overseeing the reporter working on one of the three stories described below. (The game director will tell you which one.) Other editors and reporters will be working on the other stories during the simulation.

Your main responsibility is to decide whether or not to publish the story. The game director will tell you when this decision will have to be made and will introduce you to the reporter and to the newspaper's lawyer, who will be advising you on legal issues.

The basic facts of the stories are as follows:

Story 1: Reporter Gerald Gray has been assigned to prepare a story about the upcoming court hearing of Allen Sharp, an ex-C.I.A. agent accused of smuggling weapons to the Irish Republican Army and of tax evasion.

Potential legal issues: closed court hearings
prior restraint

Story 2: Reporter Susan Green has been assigned to prepare a story about Allen Sharp's alleged involvement in assassination attempts on foreign leaders. Sharp is awaiting trial on charges of smuggling weapons to the Irish Republican Army and of tax evasion.

Potential legal issues: confidential sources
use of stolen documents
invasion of privacy

Story 3: Reporter Richard Brown has been assigned to interview Congressman George Reynolds, an ex-C.I.A. agent. The paper has received information that Reynolds was involved in some illegal activities when he worked for the C.I.A. Reynolds has been a Congressman for four years and is currently running for reelection. Election day is in ten days.

Potential legal issues: libel
right of reply

In the simulation, there are people playing the roles of Prosecutor, Criminal Defense Lawyer, Secretary, and Congressman. One or more of these characters has information that is relevant to your story and the job of your reporter is to speak with all available sources of information. Your job is to evaluate the quality of the information the reporter brings to you and decide whether or not to publish it. When the game begins, you will be at a table sitting next to the newspaper's lawyer. You should briefly discuss the story with the reporter who will tell you who he is going to interview first. When he leaves to do this, you can discuss with the lawyer some of the legal issues that might arise and then wait for the reporter to return.

The main part of your job arises when the reporter returns with his story. At this point, several things may happen:

1. He may feel his story is complete and ready for publication. Your job is to evaluate the information in the story for reliability and accuracy. You are bringing a more objective and impartial perspective to the story than the reporter, who is heavily involved in gathering the information. You are certainly eager to publish a major story ahead of the competition, but you also know that the newspaper's reputation is at stake and that every effort should be made to print truthful and accurate stories. You should feel free to ask the reporter anything you feel is relevant to the story. For example, where did he get his information? Has the information been verified by more than one source? Do the sources seem reliable? Is there any obvious reason for them to be lying? Ask yourself how confident you are in the truth of the story. As you think about the facts of the story, write down any questions that occur to you, so that you may later ask them to the reporter.

2. If you feel it necessary, you and/or your reporter are free to speak with the other reporters and editors working for the paper. If you are having difficulty gathering information for the story, perhaps your colleagues can help you.

3. The reporter may return with a legal question. You should rely on the newspaper's lawyer for legal advice and you should discuss the legal problem together. After this discussion, you and/or the reporter will have to decide what course of action to take.

SUMMARY

You take your job very seriously. You are responsible for deciding which stories appear in the paper. You believe strongly that a free press is vitally important in a democratic society and that the public must be kept informed. Once material has been made available to you, you feel obliged to publish it and let the public determine how important the information is.

The main questions for the editor are whether the story is newsworthy and whether it is factually correct. You have told your reporters many times that they should talk to everyone who might be able to verify or contradict allegations about someone. You do not like stories based on anonymous tips, but realize that important stories do originate this way. In such cases, corroborative evidence is even more important. Often the main problem is inadequate time to prepare the story, particularly when you know that competing newspapers may be working on the same story. You face a deadline every day and you want to get your story into the paper as soon as possible.

When you have made your decision about whether or not to publish, please tell it to the game director.

Note: If there is more than one editor assigned to the story, you should work together with the other editor(s). As you wait for the reporter to return with his story, discuss what you think are the main features of the story and what problems might arise. When it is time to decide whether or not to publish the story, you should try to reach a joint decision.

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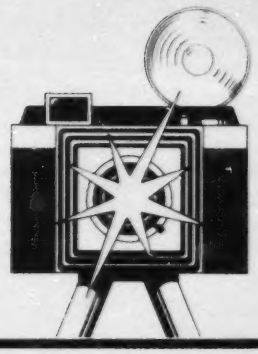
Newspaper Lawyer's INSTRUCTIONS



DO NOT SHOW THIS TO ANY OTHER PLAYERS

YOU ARE THE ATTORNEY FOR THE *METROPOLIS TIMES*, a major national newspaper. Your job is to answer any legal questions that the editors may have . During the game, you will be working with one or more editors on one of the stories described below. (The Game Director will tell you which story.) You should read carefully the sections of the *Legal Code* related to your story and try to be prepared to answer questions about the legal issues that might arise.

When the game begins, you will be sitting next to one or more editors. The editor will be discussing with a reporter what should be done to gather more information for the story. When the reporter leaves, the editor may ask you to explain some of the legal issues involved in the case. You will also have to be prepared to answer any legal questions that arise when the reporter returns to discuss his story with the editor.

In reading the *Legal Code*, you should concentrate on the issues which relate to the story you are involved in. These issues can be found in the story summaries described later. The *Legal Code* is designed to provide you with information to answer the following questions:

1. **Prior Restraint**—What is prior restraint? Can the government prohibit a newspaper from publishing a story?
2. **Access to courts**—Can the press and/or the public be barred from attending a court hearing or trial?
3. **Right of reply**—Can a person who is attacked in a newspaper demand space to present his side of the story?
4. **Libel**—If a newspaper publishes false information that damages a person's reputation, can the newspaper be sued for damages?
5. **Confidential sources**—Can a judge order a reporter to reveal the names of sources who have given him information?
6. **Privacy**—When can a person sue for invasion of privacy?
7. **Stolen documents**—Can a reporter use stolen documents in his/her story?

For each of these issues, one or more legal cases is described and the main legal points are summarized. It is important to understand, however, that lawyers, even after they have thoroughly researched an issue, are often unable to predict with certainty what will happen when the case goes to court. While you may find a perfectly clear solution for some legal questions that will be asked you, for most this will not be possible. Instead, the information in the *Legal Code* should enable you to make an educated guess or prediction about what a court will probably do. The editor or reporter may insist that you "tell him what his rights are" but all you may be able to do is to say that "I have read the relevant legal cases and in cases similar to yours, the courts have ruled in favor of the reporter. The odds, therefore, are that you will win. But the facts in the prior case are not exactly the same as the facts in your case and a judge could rule that the prior cases that I am relying on are not really relevant."

The main task that the lawyer has is to evaluate how similar the facts of a prior case are. The more similar they are to your case, the greater the likelihood that the legal ruling will be the same. If there are major differences in the facts of two cases, the judge may reach a different legal conclusion. Where there are several prior cases and the results seem inconsistent, you may decide that there is no way to predict which way a judge will rule in your case.

As these instructions have already suggested, your role is one of the more challenging ones in the simulation. Read the relevant parts of the *Legal*

Code very carefully and think about the cases that are described there. If you have any difficulty understanding any issue, please ask the Game Director for assistance.

Story Summaries

Story 1: Reporter Gerald Gray has been assigned to prepare a story about the upcoming court hearing of Allen Sharp, an ex-C.I.A. agent accused of smuggling weapons to the Irish Republican Army and of tax evasion.

Potential legal issues: closed court hearings
prior restraint

Story 2: Reporter Susan Green has been assigned to prepare a story about Allen Sharp's alleged involvement in assassination attempts on foreign leaders. Sharp is awaiting trial on charges of smuggling weapons to the Irish Republican Army and of tax evasion.

Potential legal issues: confidential sources
use of stolen documents
invasion of privacy

Story 3: Reporter Richard Brown has been assigned to interview Congressman George Reynolds, an ex-C.I.A. agent. The paper has received some information that Reynolds was involved in some illegal activities when he worked for the C.I.A. Reynolds has been a Congressman for four years and is currently running for reelection. Election day is in ten days.

Potential legal issues: libel
right of reply

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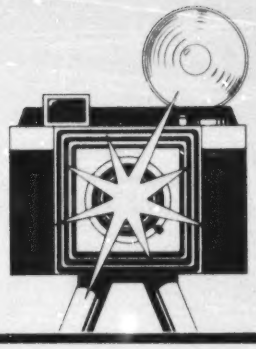
Prosecutor's
INSTRUCTIONS



DO NOT SHOW THIS TO ANY OTHER PLAYERS

YOU ARE RICHARD BROOKS, THE UNITED STATES ATTORNEY FOR METROPOLIS. You are responsible for prosecuting persons accused of violating federal law. Your most pressing problem at the moment concerns Allen Sharp, an ex-C.I.A. agent. Sharp was arrested for smuggling weapons to the Irish Republican Army and his trial is scheduled to begin in three weeks.

Shortly after Sharp was arrested, one of the lawyers in your office told you that Sharp's attorney had indicated to him that Sharp was willing to plead guilty if he would not receive a jail sentence. Your lawyer had replied that Sharp was facing serious charges and a possible twenty year sentence but Sharp's lawyers had stated that Sharp was a special case and that a trial might prove embarrassing to the government. The lawyer claimed that Sharp was prepared to implicate the C.I.A. in a recent assassination attempt on a Middle Eastern leader, one which left the leader partially paralyzed. Sharp also claimed to have knowledge of illegal C.I.A. activities, such as wiretapping, in the United States in the 1970's.

When you relayed this information to the Justice Department in Washington, you were told that Sharp was lying but that his testimony could prove damaging nonetheless. The Justice Department indicated that they would approve a plea bargaining arrangement and would also like to avoid a trial.

The lawyer in charge of the Sharp case informed you yesterday that Sharp had agreed to plead guilty if he received a sentence of not more than six months in jail. He had been reminded that his employment contract with the C.I.A. prohibited him from talking with the press about his activities as a C.I.A. agent and he agreed not to do so. You don't feel too good about all this but you feel that your superiors will be satisfied; and that they will approve of how you have handled this matter.

Your main concern at the moment is that no information about Sharp's alleged adventures leak to the press before Sharp pleads guilty in court in two days. You have instructed all the lawyers involved in the case not to talk with the press and to be as careful as possible with documents about the case. Yet, your experience tells you that leaks often occur and you want to be prepared for this eventuality. Above all, you do not want to become the main target of public criticism.

You have decided that, in the event a reporter does approach you, the following options are available:

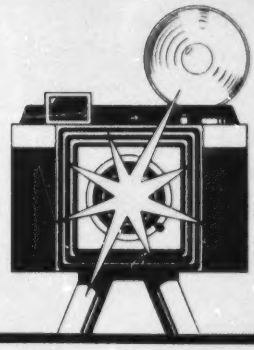
1. Delay—If the reporter does not have much information, if he seems to need more and has come to you for corroboration, you can simply stall and refuse to talk with him. You can claim that it is inappropriate for you to talk about pending cases.

2. You can agree to talk off the record. You might improve the way you are characterized in the story by agreeing to talk to the reporter without being quoted. You might agree merely to confirm or deny what the reporter knows if he promises not to mention that he spoke to you. At the same time, you might tell him that it is officials at the Justice Department who pressured you into agreeing to the plea bargain. In other words, how much information and what kinds of information you supply, is up to you to decide. Since adopting this route may violate the standards of legal ethics, you have to be certain that the information you provide cannot be traced back to you.

3. You can threaten to sue to stop publication of any story about Sharp's activities. You can claim that national security issues are at stake and that you will seek an injunction against the newspapers.

4. You can choose a combination of the above options. For example, you can refuse to talk and threaten to file suit to bar publication. Or, you might provide some information and also inform the reporter that you are considering trying to get

Secretary's INSTRUCTIONS



DO NOT SHOW THIS TO ANY OTHER PLAYERS

YOU ARE A SECRETARY IN THE FEDERAL PROSECUTOR'S OFFICE. You have worked there for twelve years and have been a model employee. One of the major cases your office is handling involves Allen Sharp. Sharp is an ex-C.I.A. agent who was arrested for smuggling guns to the Irish Republican Army. Such an act is a felony punishable by up to twenty years in prison. Sharp is scheduled to go on trial in three weeks but you have overheard several of the lawyers in the office discussing the plea bargaining that has been going on with Sharp's lawyers. The lawyers have agreed that if Sharp pleads guilty he will be sentenced to only four months in jail.

You have seen such plea bargaining arrangements many times. While you do not like them, you have accepted them as a necessary practice in an overcrowded court system. Plea bargaining in this case, however, disturbs you greatly because of an event that occurred two weeks ago. One morning, two weeks ago, Jane Casper, who works at the desk next to you, was not feeling well and asked you to answer her phone while she went to take some medicine. When you answered her phone you saw on her desk a memo she had just finished typing for her boss, the head of the criminal division. The memo was addressed to the attorney handling the Sharp case, and urged the lawyer to work harder to negotiate a guilty plea, and be more lenient, if necessary. It was imperative that a trial be avoided. The memo stated that the head of the criminal division had received a list from the Justice Department of the activities Sharp might have been involved in after he left the C.I.A. One of the activities was the attempted assassination of a fanatical Middle Eastern ruler. The attempt failed but the leader was left paralyzed from the waist down. The Justice Department feared that Sharp's involvement in this act might be revealed during a trial and the C.I.A. would be blamed for it. A successful plea bargain would reduce the risk of this.

Later that day, as you thought about what you had read, you became angrier and angrier. Sharp's violation of gun smuggling laws was not going to be prosecuted and his possible involvement in foreign assassination attempts was going to be covered up. It has occurred to you that the C.I.A. might not be as innocent in the attempted assassination as the memo states. You are also certain that Sharp must have been involved in other similar acts of international terrorism.

The following day, the other secretary stayed out sick and you noticed that the copy of the memo she had typed the previous day was on her desk waiting to be filed. You read it again and it made you even angrier. During the past week, you have decided to share your information with a reporter for the *Metropolis Times*.

When the simulation begins, you are going to be approached by Susan Green, a reporter for the *Times*, whom you called yesterday and who has agreed to meet with you. Over the phone, you told her only that you had information that Sharp had been involved in assassination attempts on foreign leaders. The reporter is going to ask you questions about what you know and you will have to make a decision about the following issues:

1. Confidentiality—You can, if you wish, agree to talk with the reporter only if she promises never to reveal the source of her information and to treat you as a confidential source. You should be aware that in your state the law does not protect the confidentiality of reporters' sources. In other words, a judge can order a reporter to reveal who her sources are. If the reporter refuses to provide this information, she may be held in contempt of court and sentenced to jail. You should, therefore, be satisfied that the reporter is willing to do this before agreeing to confidentiality. If you speak to the

reporter without obtaining promises of confidentiality, you will almost certainly lose your job and might even be prosecuted for a criminal act.

2. What information should you give the reporter? You can, if you wish, merely tell the reporter what you know and speak as persuasively as possible about why you think the issue is important and why she should believe you. You may put in or leave out as many details as you want. You may also, if you wish, agree to try to xerox the memo, but this would be very risky for you. Obviously, doing this will be the easiest way to persuade the reporter that you are being truthful but it may also cause a greater reaction from your employer and lead them to attempt to uncover the source of the story. If the reporter seems unpersuaded by your story, you might suggest that he/she get corroboration from the criminal defense lawyer who is representing Sharp, or from the prosecutor.

3. There is one other piece of information which you might want to share with the reporter and which might persuade the reporter that you are being truthful. At the same time that you saw the memo about Sharp, you also saw a memo about William Cross, Sharp's defense lawyer. The memo indicated that an unusual number of Cross's cases had been postponed recently and that Cross had been drinking heavily since his divorce, four months ago. There was no evidence that Cross's behavior in trials had been affected but several of the postponements were probably related to this.

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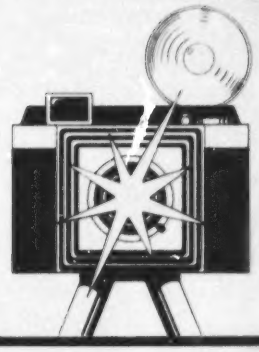
Criminal Defense Lawyer's INSTRUCTIONS



DO NOT SHOW THIS TO ANY OTHER PLAYERS

YOU ARE WILLIAM CROSS, an attorney specializing in criminal cases. The case which is currently taking most of your time involves Allen Sharp, an ex-C.I.A. agent. Sharp was arrested seven months ago for attempting to smuggle arms to the Irish Republican Army. He is scheduled to go on trial in three weeks. The charges against him could bring a sentence of more than twenty years, if he is convicted. Three months ago, Sharp was also indicted for tax evasion. Sharp has owned a private security firm since leaving the C.I.A. four years ago. The I.R.S. charges that he received some payments from foreign governments which he has not paid taxes on.

Sharp is one of the more interesting individuals whom you have defended. Several weeks after he was arrested, he told you that he might be willing to plead guilty to some charges, but only if he did not receive a jail sentence. Sharp had no criminal record and you thought that the prosecutor might be willing to bargain, particularly if the case did not receive a lot of publicity in the newspapers. Most of your cases end up being plea bargained, with the client pleading guilty in exchange for a reduced sentence or charges. You did not, however, think that the government would agree to a fine in lieu of any jail sentence. Sharp then instructed you to tell the prosecutor that he had top secret information which he would reveal at a trial. Sharp claimed that he knew about the assassination attempt last year of an important Middle Eastern leader. The leader lived, and is still in power, but was paralyzed from the waist down. Sharp said that he would claim that the C.I.A. was responsible for the assassination attempt. He suggested that the government might be more willing to bargain when it heard this.

You discussed the case and Sharp's claim about the assassination attempt with the prosecutor, who said that he would have to consult with his superiors in Washington. Shortly afterwards, the tax charges were filed against Sharp.

The prosecutor indicated to you that Sharp was lying but that since he had no prior record, they would be willing to reduce the charges in exchange for a plea of guilty. Further negotiations led to an agreement, which Sharp accepted, under which Sharp would plead guilty to lesser charges involving both the gun smuggling and the taxes, and would be sentenced to four months in jail. He would also be required to repay $40,000.00 in back taxes. A hearing has been scheduled for the day after tomorrow at which time Sharp will plead guilty and be sentenced.

You have occasionally wondered about whether Sharp was himself involved in the assassination attempt and whether or not the C.I.A. was involved. You never asked Sharp directly whether he was telling the truth. Whatever Sharp would have told you would have been confidential and protected by the attorney-client privilege but it would not have been relevant information to your defense. You could never have been certain that Sharp was telling the truth anyway.

There was one unusual element in your final negotiations with the prosecutor. Prosecutor Brooks asked you to inform Sharp that he was fortunate that the government had not decided not to investigate his recent activities more closely and that he would benefit greatly by being more careful in the future. You dutifully communicated this to Sharp, who briefly smiled when you told it to him. You were not sure what to make of this. The more you thought about it, the more it seemed like a request and warning for Sharp to keep silent about C.I.A. activities.

Your main concern today is that details of the plea bargain not be made public until the court hearing. You know that if this case had received a lot of media publicity, the prosecutor might not

have been as willing to negotiate. Sharp called you an hour ago and told you that a reporter, Gerald Gray, had called him but that he had referred him to you. When the game begins you will be contacted by this reporter. You are very concerned that a major story tomorrow could cause everything to fall apart and even for the prosecutor not to fulfill the bargain. Your main thoughts on how to deal with the reporter are as follows:

1. What does he know? You do not want to increase his curiousity about the case. Does he know that there will be a hearing in two days and does he know why it has been scheduled? If so, does he know the details of the plea bargain? If not, should you tell him the details or merely tell him to come to court and see what happens?

2. What does he know about Sharp? Is he merely interested in the gun running and tax charges or does he know about some of Sharp's other activities?

3. Is he planning on interviewing other people? Are other reporters also working on this story? When do they plan to publish something?

You perceive that your options are as follows:

1. You can refuse to talk to the reporter altogether and give him no details about the case or the plea bargaining. If he seems to know nothing and does not plan to investigate further, it might be wisest to say that you have decided not to talk with the press until after the hearing.

2. If he seems to know a lot about the case, you must decide how to respond. Your main concern is that a barrage of public attention, before the court hearing, even if it has nothing to do with the assassination attempt, could cause the prosecutors to change their minds. A story about the assassination attempt could also lead the prosecutor to break the agreement. In such circumstances, you might try to bargain with the reporter and attempt to persuade the reporter to hold the story until after the hearing. You could promise some secret information to the reporter or agree to arrange an interview with Sharp. You could also leak some information to the reporter if he promised not to reveal the source Keep in mind that your main concern is making sure that the hearing takes place as scheduled.

3. You have considered the following two legal options, but both would require the participation of the prosecutor and you have doubts that they would be successful.

a. You can tell the reporter that the court hearing may be closed to the press and the public but that you might agree to leave it open if he cooperates with you. You are aware that persuading a judge to close a plea bargaining hearing to the public will be very difficult. To achieve this you will probably have to persuade the prosecutor to join you in this request to the judge. Both of you will have to argue that sensitive national security information might be revealed at the hearing and for this reason the hearing should be closed. Supreme Court decisions concerning closing courtrooms do not present a clear cut answer to whether a guilty plea hearing can be closed. Criminal trials must be open to the public but some pretrial hearings can be closed. If you can persuade the prosecutor and the judge that sensitive national security information might be revealed at the hearing, the judge might be willing to order the press out of the court. While they would later be given the details of the guilty plea, they would not get a complete transcript of the hearing.

b. You might try to persuade the prosecutor to ask a judge to prohibit the newspaper from printing any stories about the assassination attempt, if the newspaper already has this information. This kind of court order is called a "prior restraint" on the press and it has rarely been permitted by the courts. In the Pentagon Papers case, for example, the Supreme Court did not stop the *New York Times* and the *Washington Post* from publishing documents that the government claimed would injure national security. You would have to show that the story would cause "direct and irreparable harm" to this country and that the national security would be threatened. You think that it is possible, given the precarious state of our country's relations with some Middle Eastern and Third World nations, to try to make such a case. At any event, you could talk to the prosecutor about this and see whether he is willing to try to do this. If he is willing, and even if you only succeeded in delaying publication a few days, you would have achieved enough.

This case is coming to a climax at an unfortunate point for you. Since your divorce four months ago, you have been drinking heavily and were forced to ask for court postponements in several cases. Fortunately, you handled the two trials during this period without any problems. Last night you attended an Alcoholics Anonymous meeting and are confident that this will help you. You had been through Alcoholics Anonymous once before and did not drink for a period of four years. You are worried that the press may have discovered that you have been drinking lately and that this may complicate the whole situation. You consider your problems to be personal and not the business of the press. If the reporter brings up the subject of drinking, you will tell him/her that this is a private matter and that if anything is printed, you will sue for invasion of privacy.

Summary of Defense Lawyer's Responsibilities

1. You will be approached by a reporter and will have to make several judgments and decisions about what to tell him.

2. The reporter may, at some point, tell you that he has to consult his editor or the lawyer for the newspaper.

3. You are free to talk to other participants in the game, such as the prosecutor or, if you feel some need to do so, the reporter's editor.

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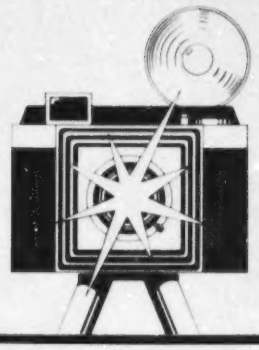
Congressman's INSTRUCTIONS



DO NOT SHOW THIS TO ANY OTHER PLAYERS

YOUR NAME IS GEORGE REYNOLDS: YOU HAVE BEEN A CONGRESSMAN FOR FOUR YEARS and are running for election to your third term. You are in a close race and election day is only ten days from now.

Before you were a congressman, you practiced law and before that you had worked for the C.I.A. for ten years. In each of your previous races, the issue of your C.I.A. activities had come up and you have heard that the *Metropolis Times* is now going to do a series on ex-C.I.A. agents. Your next appointment is with a reporter for the *Times* (when the game begins, he will seek you out), and you suspect that your role with the C.I.A. will come up again.

Your policy in the past has been to refuse to talk specifically about your work at the agency and you will tell the *Times* reporter this. Actually, you never were involved in any controversial or very exciting activities. Most of your work involved comparing and evaluating the different assessments of Soviet naval capabilities which were supplied to the C.I.A. by friendly foreign governments. Fortunately, you had no involvement in the agency's domestic surveillance and wiretapping program. Once, in your first political campaign, you had been confronted by a false accusation. You had angrily told the reporter at that time that it was false and that if it were printed, you would sue the paper for libel.

You are determined, particularly just before an election, not to let the C.I.A. experience become a negative issue in the campaign. Your opponent has not raised it but you would not be shocked at some attempt to smear your reputation. If necessary, you could do the following:

1. Sue any reporter or newspaper for libel that prints false information about you.
2. Demand space in the newspaper to reply to any negative stories.
3. If you think that you are being smeared by your opponent, you may go to the prosecutor (ask the Game Director who he is) and ask him to investigate the situation.
4. If you think the reporter is being unreasonable, you may go to the reporter's editor and explain your position to him.

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